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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEVIN LEEIZACC HUMPHREYS, Defendant and Appellant.	B283579 (Los Angeles County Super. Ct. No. MA067868)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Devin Leeizacc Humphreys (defendant) appeals from his felony assault and sex offense convictions. He contends that the trial court erred by admitting evidence of uncharged misconduct pursuant to Evidence Code sections 1101 and 1108; failing to exclude rebuttal evidence as a discovery violation sanction; instructional error, including giving an instruction regarding consciousness of guilt; limiting impeachment evidence; and improperly consolidating two separately filed cases. Defendant also contends that the cumulative effect of the errors deprived him of his rights to due process and a fair trial. We find all of defendant's contentions to be without merit, and affirm the judgment.

BACKGROUND

In the amended information filed March 13, 2017, defendant was charged as follows: counts 1, 2, and 3, assault with a deadly weapon (vehicle) in violation of Penal Code section 245, subdivision (a)(1);[1] count 4, oral copulation of a person under the age of 16, in violation of section 288a, subdivision (b)(2); count 5, sexual penetration by foreign object, in violation of section 289, subdivision (i); counts 6, 8, 9, unlawful sexual intercourse in violation of section 261.5, subdivision (d); count 7, sodomy of person under the age of 16, in violation of section 286, subdivision (b)(2); and count 10, lewd act upon a child, in violation of section 288, subdivision (c)(1). Following a jury trial defendant was found guilty of all 10 counts as charged.

On May 5, 2017, the trial court sentenced defendant to a total term of 11 years 8 months in prison, comprised of the upper term of four years as to count 1, with a consecutive one-year term as to each of counts 2, 3, 6, 8, and 9, plus an eight-month

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[1] All further statutory references in this paragraph are to the Penal Code.

consecutive term as to each of counts 4, 5, 7, and 10. The court imposed mandatory fines and fees, calculated presentence custody credit as 33 actual days and 32 days of conduct credit, and scheduled a hearing on victim restitution.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Testimony of Brittany H.

Brittany H. testified that defendant lived near Brittany's family in Quartz Hill. Brittany and her two brothers, Jack and Cameron, were triplets, and all three became friends with defendant's son, Isaac in middle school.[2] During the summer of 2013, Brittany had a crush on Isaac, and spent time with him at her house and in groups at school. Once they engaged in oral sex at her house.

In spring 2014 when Brittany was 14 and their relationship had become that of friends, she often watched Isaac play baseball at the high school. Brittany first met defendant in 2013, when she was about 13 years old and in the eighth grade. Defendant obtained Brittany's phone number and began sending her messages through Snapchat, a cell phone application from which messages disappear 10 seconds after being opened. Eventually defendant invited Brittany by text to watch Isaac's game. After she agreed, defendant picked her up from her house after he had dropped off Isaac for pre-game warm-ups, and suggested they go to his house for a back rub. She agreed. Although Brittany had not previously spent time with defendant, it did not strike her as

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[2] Defendant's son is Devin Isaac J. Because he shares defendant's first name, and many of the witness and his friends called him Isaac, we will refer to him as Isaac even where a particular witness called him Devin, for consistency and to avoid confusion.

odd. They went into the guest bedroom, where defendant told her to remove her tank top, under which she wore a bra. He applied lotion and rubbed her back for about 15 minutes before he unhooked her bra. When she did not say anything, he then lay on his back, pulled her on top of him, kissed her on her lips, and continued to do so for about five minutes. They then went to the baseball game, and afterward, defendant took her home. She told no one about the incident.

Thereafter when they were together, defendant progressively touched Brittany more, even while Isaac was home. The touching included groping her buttocks, vaginal area, and breasts, and occurred variously in defendant's bedroom, the hallway near the bedroom, or near the shed in the backyard, depending on where Brittany's brothers and Isaac were. Defendant sometimes inserted his fingers into her vagina. One day while they were kissing in his bedroom, defendant pulled Brittany down by her shoulder, pulled down his pants, and had her place his erect penis in her mouth. She thereafter orally copulated him often, noticing that he shaved his pubic hair. Defendant orally copulated her a couple times. Defendant's conduct progressed to sexual intercourse in mid-April 2014. The first time was in defendant's recreational vehicle (RV), despite the fact that Isaac and others were in and around defendant's house, including the garage, at the time. After the first time, defendant and Brittany had sexual intercourse once a week or every two weeks. Brittany estimated that when she was 14 and 15 years old, they engaged in sexual intercourse about 100 times, including 10 to 20 times in defendant's car.

Brittany told her friends Kaitlin, Madison, and Alexis about the first sexual incident in the RV, and a couple days thereafter the deputy sheriff assigned to her school, Deputy Carter, came to Brittany's home, acting on an anonymous tip. In

their hour and a half conversation, Deputy Carter asked Brittany whether she had sex with defendant. Brittany lied, saying she had sex with Isaac. Brittany lied because she liked defendant, liked the attention from a mature man, had romantic feelings for him, and did not want him to get in trouble. Deputy Carter accused her of lying and threatened to take her to the hospital for a rape test, which scared Brittany. She did not tell anyone else about defendant for the next few months.

Defendant and Brittany continued to have sex regularly through the summer of 2014, in his house or in his white Honda Accord which he parked down the street from her house. At one point during the summer of 2014, Brittany reluctantly gave in to defendant's begging to have anal intercourse. Defendant's preferred position for intercourse was to have Brittany lie on her back with her feet on his shoulders, while he stood in a way that he could see the images from the exterior, residential surveillance cameras on his bedroom television. Defendant did not ejaculate inside Brittany, but on the carpet next to the bed.

Brittany described an incident that occurred when she went to the Antelope Valley Fair with plans to meet defendant later for sex in his car. At the fair she met up with her friend James A. and they were together until defendant sent her an angry text message, saying that he had been there the entire time and had seen her with a guy. Defendant told her where to meet him, and once she was in his car, defendant yelled at her, saying she did not need to play games, and that if she wanted to mess around with all these guys, he would never see her or talk to her again. Later defendant apologized, and they had intercourse in defendant's Honda.

Brittany's family, defendant, Isaac, and family friends, including Anna W., went camping and dirt bike riding a few times together. A 2015 New Year's camping trip was attended by

Brittany's family, defendant, Isaac, and some of defendant's friends who were not well known to Brittany. After everyone had gone to bed, Brittany and defendant walked a few hundred yards away from the RV's to an outhouse structure where defendant placed her hands on the wall facing away from him, inserted his penis into her vagina, and ejaculated outside her. They then returned to camp.

Brittany told Isaac in August or September of 2014 what had been going on between her and his father, but Isaac did not believe her. The relationship ended June 2015, when she was in summer school. Brittany's brother Jack took a photograph of her kissing a boy at school and sent it to defendant, who sent her the picture with the message never to talk to him again, that everything was over.

Defendant had a swimming pool, and Brittany, her brothers, and other teenagers went there to swim during the summers of 2014 and 2015. Sometimes the groups were small and other times there was a large group. Among them, Brittany would sometimes see her friends Daniel O. and Kaitlin, as well as a girl named Jaley, but she never saw anything happen between them and defendant. There were also parties attended by Isaac's friends. After her relationship with defendant ended, Brittany went to one of the parties with her brother Jack. Many people there were intoxicated, and it was loud. She and defendant were civil to one another. Brittany recalled seeing defendant take the bathing suit top off a girl, Demree, throw it on the roof, and make her run around the house without her top for quite a while.

Brittany had seen, but never met, Eileen, who lived in a rented house on the property with her teenage children. Brittany was also aware of defendant's adult girlfriend who was also named Brittany, but believed that adult Brittany and defendant

were no longer speaking, and she never saw adult Brittany at defendant's house.

In late 2015, Brittany thought of reporting defendant in order to protect her friends and defendant's daughter from him. Brittany asked her friend Daniel, who was in the Sheriff's Explorer program, what would happen if she reported defendant. When Daniel said that defendant would go to jail, Brittany decided against reporting him because they were civil and she respected defendant's hard work to gain custody of Isaac and to buy his house and other possessions; and her experience with Deputy Carter made her afraid to file a report. Daniel urged Brittany in text messages to report defendant because what defendant did was wrong. Daniel added that he would report it if she did not. After Brittany sent a screen shot of Daniel's texts to defendant, Isaac approached her and Daniel in the school parking lot, angrily asked why she was lying, and insisted that they come to his house. While they waited for defendant to come home, Isaac asked questions which Brittany ignored. When defendant arrived they did not talk, but defendant gave Brittany a look which she interpreted as telling her not to say anything. She continued to ignore Isaac's questions.

When Deputy Bissell, the school deputy at Quartz Hill High School, approached her, Brittany spoke honestly. Brittany told a friend of her brother's the same things she told the deputy.

Testimony of James A.

James A. testified that he and Brittany were friends in high school. In August 2014, he attended the Antelope Valley County fair, met up with Brittany and other friends, and then spent about two hours with her, taking rides and walking around. Later that night, Brittany told him that a friend's dad was picking her up, so he walked her to the exit, where saw defendant. James did not know defendant personally, but

recognized him as the father of a former football player at school. When Brittany went to talk to defendant, who was about 15 feet away, defendant looked angry, and Brittany looked sad and disappointed. After James watched them for about five minutes, Brittany told James that she had to leave with defendant, so James left and rejoined his friends. James did not see Isaac, Jack, or Cameron that night at the fair.

Testimony of Kaitlin F.

Kaitlin F. testified that she and Brittany were friends in high school. Kaitlin also knew Isaac and Brittany's brother, and would socialize with them. She first went to Isaac's home during freshman year, where she met defendant. During the summer of 2014, she visited defendant's home a couple times a week, just to hang out while Isaac and defendant did things around the house. Brittany's brothers were usually there and Brittany was sometimes there with them. Although there was a swimming pool at the house, Kaitlin did not take her swimsuit when she went there. Once Isaac threw her into the pool with her clothes on, and another time one of Brittany's brothers did.

Sometimes there were parties at defendant's house where alcohol was provided. She recalled once when Kaitlin was 15 years old, defendant who was drinking, offered alcohol to her, saying, "If you think you have been drunk before, I can get you something that would get you really drunk." He gave her alcohol twice that night, something high proof. She got drunk and threw up, but did not pass out. It happened a second time a couple months later.

When Kaitlin first knew defendant, he did not talk much. He seemed like any friendly father who liked being involved with his son and his son's friends. However, after awhile defendant's behavior became childish. He always wanted to do what the kids were doing, and acted like a buddy, not a parent. He made

provocative comments that were sexual in nature to her and other girls, about their appearance and their bodies, which made her feel awkward and uncomfortable. Kaitlin then began to distance herself from that group of friends. Not long after Brittany told her during their sophomore year that she was having sexual relations with defendant, Kaitlin broke off contact with them entirely. Although Kaitlin did not believe Brittany at first, she heard comments at school and remembered that Brittany and defendant were often together, close to each other and very touchy. It became apparent to her that something not right was going on, so Kaitlin eventually believed that what Brittany had told her was true. She then told her mother about it.

Testimony of Jaley F.

Jaley F. testified that she dated Isaac in the sixth grade, and after that they were friends on and off. In high school they were good friends. Brittany and her brothers were also her friends, and were in the same grade. During the summer of 2014, Jaley often spent time at Isaac's house. Other visitors at the time included Brittany, her brothers, and their friend Demree. They went swimming, played roughhouse games, and once they had a mud fight. The boys were always active, chasing one another, playing games, and riding off-road vehicles. Once, defendant took her phone and she wrestled him for it to prevent him from texting someone. She jumped over him and hit him with a pillow to get him to release the phone.

Another time, defendant bet Jaley that she would not get drunk from one shot of alcohol, and then he gave her two alcohol drinks in a Solo cup and asked whether she was drunk yet. Jaley passed out and could not remember most of the rest of the night, but she did remember being on the toilet talking on the phone, which was video recorded. Isaac, another boy, and defendant all

made fun of her and played the audio for her. She woke up the next morning in Isaac's room, wearing men's boxers and shirt, not her own clothes. Defendant told her that when she vomited, she urinated the floor, so he removed all her clothes and underwear, wiped her clean, and put her in the other clothes.

Jaley did not consume alcohol at defendant's home again after that. Months later, in February 2016, when the school's Deputy Sheriff took her out of class to speak to her, Jaley told her that defendant had given her alcohol, and that defendant had described changing her clothes after she had vomited and urinated. The interview lasted 30 to 40 minutes, and Jaley thought that the deputy was aggressive. At that time Jaley heard rumors about defendant and Brittany, something about a kiss, but by then she no longer went to defendant's house and was not much involved with Brittany and her brothers.

Anna W. testimony

Anna W. once considered Isaac to be her best friend in high school. They met freshman year, and she often visited his home. Sometimes defendant was there, and when she and Isaac socialized outside the home with other friends, defendant was with them most of the time. Many teenagers, including Jack, Cameron, and Brittany, went to defendant's house after school, on weekends, and during the summer. Defendant and Isaac were like brothers. Defendant acted like one of the kids and they were all friends. Anna considered both Isaac and defendant to be her very good friends. Anna went on camping trips with defendant and Isaac, and once Brittany and her family came along.

Anna got drunk about four or five times at defendant's house after defendant provided her with alcohol, usually vodka. Sometimes she gave him money to buy it for her, and she drank it while she was there. She would swim, roughhouse, and wrestle with both Isaac and defendant, and one time, defendant pulled

her thong underwear, and gave her a wedgie. This ripped her underwear, and defendant took her to get a new pair. Anna and other teenagers sometimes spent the night there. In private, defendant would tell her she was pretty, would communicate by Snapchat with her, and asked if she wanted to go to his room. Once when she was in Isaac's room about to go to sleep, defendant came in and asked whether she wanted to come to his room. She pretended to be asleep and did not respond. Anna estimated that she was 15 or 16 years old when that happened.

Anna described three incidents during which defendant touched her sexually. The first time, he touched her leg during a camping trip in his RV She woke up to him rubbing her leg, "freaked out," and tapped Isaac, who was asleep across from her. When Isaac woke up, defendant stopped. A couple months later, she, Kaitlin, Isaac and defendant were all sleeping on the couch in defendant's living room, when defendant pulled her down by the leg and inserted his fingers into her vagina. He said, "Let's go to my room," but when she did not move, he stopped and went back to sleep. On a third occasion, when Isaac was at baseball practice, defendant was teaching Anna to drive a manual shift, and he kissed her. She told him it was weird, and defendant replied, "This is not weird. It's okay. We can try it another time." Anna later told a friend about it, but no one else, and although she and Brittany discussed Brittany's situation, Anna did not tell her about her experiences with defendant.

Hope T.'s testimony

Hope T. and Daniel began dating during the summer of 2015, and both were friends of Isaac. She met defendant several times prior to January 25, 2016, while visiting Isaac. During one visit, defendant, Daniel, defendant's younger daughter and her mother Kari-Lyn, Brittany, and her brothers were there while Hope played X-Box in the living room with Isaac. Another time

they happened to meet defendant in the neighborhood, and defendant said something to the effect that she looked different with clothes on. Neither she nor Daniel knew what he meant. Once, when she was 17 years old, she was at Daniel's house, lying on the bed in his room and watching a movie. Defendant, Isaac, and a girl walked into the room. Defendant asked what they were doing, and when Hope replied that they were watching a movie, defendant said, "Oh, that is all you are doing," and, "It looks like Daniel doesn't have any clothes on." Annoyed, Daniel said that he did, and lifted the blanket on his side to demonstrate. Defendant said, "I don't care if you have clothes on," and he ripped the blanket off Hope. It made her uncomfortable, and she and Daniel avoided defendant after that.

Hope heard rumors in mid-January 2016 about defendant and Brittany, and soon afterward, someone threw a large rock through a window of her parent's house. The rock broke the window and landed on the couch. Hope was afraid, did not know what defendant was capable of, but had heard stories, and she knew that Isaac would do anything for his dad. Then, on January 25, Daniel texted her that Isaac had punched him in the face at school. That evening, Cameron and Jack showed up around 6:40, while she was with Daniel and his brother David. Hope, Daniel and Jack left in Jack's truck. Daniel sat in the front passenger seat and she sat behind him. Soon, she noticed defendant driving his white Honda toward them. Defendant turned around, followed them, and swerved toward them as Jack maneuvered to avoid being hit. After Jack turned onto another street, she saw headlights close behind them. As Jack drove faster, defendant's car moved to the left of the truck and swerved toward them. Hope could see defendant's face, and she saw Isaac in the passenger seat. Defendant's car was close enough so that

had Jack not swerved away, defendant's car would have hit the truck.

Defendant continued multiple times to drop behind the truck, then come alongside it, swerve toward them, and then swerve away. When Jack stopped at a stop sign, defendant pulled up next to the truck, Isaac got out of his car, went to the driver's side window and tried to open the door, but it was locked. Isaac then angrily punched the window, said something like "I'm going to get you," and then returned to defendant's car. Jack was then able to turn right. After Isaac punched the window, Hope was able to record part of the event, and the video was played for the jury. Hope, Jack, and Daniel were all frightened. Daniel called 911 and then took over driving the truck. The incident lasted 10 to 15 minutes.

Daniel O.'s testimony

Daniel attended school with Brittany, her brothers, and Isaac. He and Isaac had been friends about six years, since the seventh grade, and were once best friends. Daniel was also friends with Brittany and her brothers, and they often spent time together at defendant's house, where there were parties at which defendant provided alcoholic drinks. Other times, they would swim, work on cars, play video games, box, and engage in dares and pranks. Defendant participated in the activities, and they had fun with him. Whenever Daniel did not want to participate in a dare, Isaac and defendant would hold him down and put hot sauce in his mouth, or defendant would hold a Taser to him and threatened to use it if he refused. Defendant had used the Taser on him and other kids before, and thought it was funny. Daniel made a prank 911 call under such circumstances while he was with defendant, Isaac, and others at defendant's house. Defendant had threatened to use the Taser on him if he did not make the prank call. Daniel told the 911 operator that there was

a person down at a nearby location, and they watched the emergency responders from the window of defendant's house. Daniel had joined the Sheriff's Explorer program when he was about 15 years old, and was in the program when he made the 911 call. He was embarrassed and wished he had not made the call. When his supervisor learned about it, Daniel spoke to Sergeant Becker and admitted his action. Daniel was suspended for the prank and when he was allowed back on active status, he was restricted from certain activities such as ride-alongs.

In or around September 2015, Brittany told Daniel about her relationship with defendant. She told him she wanted to report it, but had lied about it and was afraid she would get into trouble for lying. She then changed her mind, wanted to keep it a secret, which he did for about three months before urging her to be truthful. Daniel believed Brittany, finding her report to be consistent with his observations of defendant's jokes and flirtatious behavior.

When Daniel sent Brittany text messages urging her to report the actions of defendant he also asked her to delete the messages so that defendant would not find them. Daniel was afraid that defendant would be angry and come after him, but he felt a responsibility to come forward to prevent something from happening to other people. Also, both Cameron and Jack had approached Daniel to ask for help with the situation. On January 13, 2016, Daniel finally made the report to school Deputy Bissell. Daniel did not discuss the matter with Isaac, although Isaac tried to persuade him to come to his house to talk. The day before making the report, Daniel received multiple text messages from defendant asking him to come over to talk. Daniel did not go to defendant's house, because he was afraid of what defendant and Isaac would do, and sometime after that, Isaac punched him in the face at school. After that, exterior lights at

Daniel's house were vandalized and the front window of Hope's house was broken.

On January 25, at 6:40 p.m., when Daniel left his house in Jack's truck with Jack and Hope, he saw defendant's car parked not far away. He then saw defendant's car move toward them in such a way that Jack had to take an evasive action, going left instead of right as he had intended. As Jack drove southbound, defendant pulled alongside the truck, and jerked his car toward it as though trying to maneuver them into a parked car or oncoming traffic. Daniel saw defendant in the driver's seat and Isaac in the passenger seat. Video footage from surveillance cameras installed at Daniel's house was played for the jury, as Daniel narrated. Defendant's car is seen going toward the truck. Jack turns left, and defendant is seen turning around and following them. A second camera captured defendant's car on the side of the truck and then behind it as they made a loop around the neighborhood and came back to Daniel's street. When Jack stopped at an intersection, defendant blocked them with his car, Isaac got out, approached the window, punched it, and then tried to get in while he said, "I'm gonna fuckin' kill you," pointing at Daniel and Jack. When defendant had to move for oncoming traffic, Jack sped off and Daniel called 911. Then Daniel took over driving and went toward Jack's house, because he knew his parents were home. On the way, Daniel saw defendant coming toward them in their lane, so he turned left, looped around to another street and drove back down toward Jack's house. While waiting at Jack's house for law enforcement, Daniel thought he saw defendant's car pass by the house. He called 911 a second time.

Jack H.'s testimony

Jack first met defendant just before freshman year, when Isaac was his best friend. Jack and Cameron often spent the

night at defendant's home. Brittany usually came along when they visited, but as far as he knew she did not spend the night. They would help defendant around the house and in the yard, and they would work on cars. When the boys were working in the yard, defendant would tell Brittany to go inside and do the laundry, and they would not see her for up to an hour. Sometimes defendant went into the kitchen and they would lose track of him for some time. Brittany would go into the house almost every time they were there, but Jack never saw or heard anything out of the ordinary during those visits, except the time that he and Isaac were playing with a go-cart, and about 45 minutes later, he saw Brittany and defendant coming out of defendant's house together. It seemed odd to him.

Also, defendant and Isaac often went to Jack's home to spend time with his parents and the family, who considered defendant a close friend. The two families would camp together in separate RV's. Once, Anna W. went with them. Sometimes Jack and Cameron went to the lake with Isaac and defendant, who owned a boat, where they would wakeboard and swim. Brittany accompanied them once.

In August 2014, Jack went to the Antelope Valley Fair with Isaac, Cameron, and Brittany. His parents dropped them off, and Brittany went off with her friend James A., while Jack, Cameron, and Isaac stayed together and met up with other friends from school, including Anna and Kaitlin. They had been at the fair for about four hours before meeting back up with Brittany, who was with defendant. James was not there. Jack, Cameron, Brittany, and Isaac then all left in defendant's car.

Jack described defendant as really friendly with Isaac's teenage friends. Defendant would play pranks and jokes with them. For example, someone would hold him or Isaac down and someone else would hit or spank them. There were firecrackers,

Tasers, and hot sauce in the house, which defendant occasionally used on them or to scare them if they did not want to do something. Defendant had used the Taser on Jack during such play. Jack drank alcohol at defendant's house just once after finding a canned alcoholic drink on the counter. Other kids would give defendant money to buy alcohol for them. Defendant worked a lot and was often out of town, so sometimes when he was gone overnight, Jack and others would hang out on the property and occasionally spend the night.

Jack felt close to his sister, but she was not very open, and she stayed to herself. Brittany did not have many friends and often stayed in her room, but when defendant came over, she would come out to talk to him, and then go right back to her room when he left. Jack never saw physical contact between defendant and Brittany but saw the way they acted together. She was very happy to see him, like it was the highlight of her day, like he was her boyfriend. Defendant was friendly and nice to all the kids, and paid attention to all of them, but not as much as he showed Brittany. Defendant frequently texted Brittany. Jack was able to see defendant's phone from the back seat of his car and would see Brittany's name. All this caused him concern, but he did not tell anyone about it. Jack found it odd that Brittany would be with an adult for over 30 minutes, and he asked her about it. She deflected with denials until about a week before the car chase, when Isaac asked her, "Have you and my dad ever done anything?" Brittany replied, "Yes. I tried telling you that, but you guys don't believe me."

Jack told himself that defendant would never do something like that, but he thought differently when he was with his friend Deegee at defendant's house toward the end of his friendship with Isaac. They were spending the night before going snowboarding the next day. When someone said Deegee's sister

was attractive, defendant said, "Oh, have her spend the night, and I'll pay for her lift ticket." Jack thought about it, thought it was weird, and even Isaac said, "Whoa, dad, chill out." Defendant replied, "Oh, I thought she was 18."

Although Jack was suspicious, he did not speak to his parents. It shocked him, he was scared and he did not know what to do. Finally he asked Daniel for his help in reporting it, and he and Daniel went together to the school officer. A day or two before the report was made to Deputy Bissell, defendant sent Jack the following text: "What is Daniel O[.] talking about?" When Jack replied that he had no idea, defendant asked him to come over to talk. Jack went and found defendant "shaking scared." Defendant said, "If I could hurt a minor, I would," and "I would never do something like this."

Jack's friendship with Isaac broke apart when Isaac became furious with Jack after defendant's relationship with Brittany was reported. Jack and Daniel had been friends since elementary school, and they became closer when Daniel told him about Brittany. Jack had just received his driver's license the day before the car chase incident. He picked up Hope and Daniel and drove by defendant's house. Jack saw a car coming, thought it was defendant's, became frightened, and drove too fast, causing his tires to spin in the dirt. Dirt and a small dust cloud were created, but Jack denied having intentionally burned out. After two or three spins, Jack reached asphalt and returned to Daniel's house. He saw the white Honda a few minutes later, and when defendant drove toward him, Jack went around him. Defendant then gave chase, came up beside Jack, and tried to run him off the road. Jack had to swerve and brake hard several times to avoid a collision. When defendant's car was on a diagonal in front of the truck, Isaac got out and punched the window of the truck. Isaac pointed and said, "I'm going to fucking kill you," and

then got back into defendant's car. Jack believed that defendant was going to hurt him. He was so frightened that he switched seats with Daniel, who drove back to Jack's house.

Testimony of Brandy O.

Brandy O. turned 14 years old in December 2001. She lived with her mother, who rented a room in her house to defendant several weeks before Brandy's 14th birthday. The evening after defendant moved in, Brandy was home alone after defendant went out with friends, and she drank about 10 to 15 shots of rum that had been left on the kitchen counter. It was the first time she had consumed alcohol. She became very intoxicated and passed out. Brandy's mother later told her that she vomited and her mother had to help her into the shower and into to bed. When Brandy woke up around 5:00 a.m., she was still intoxicated. Feeling disoriented, she went into the living room, where defendant was watching TV, and sat on the couch, wrapped in a blanket. She could not recall what she was wearing or whether she had a conversation with defendant, but she remembered that defendant touched her, told her to go to her room, and followed her. She lay on her back, defendant removed her clothing, inserted his penis into her vagina, and after a few minutes, ejaculated onto her stomach. Still feeling intoxicated, Brandy could not remember what happened after that. She did not report it to anyone right away, and defendant continued to live in the home. A couple months later, defendant persuaded her to have sex with him while her mother was in the other bedroom. She did not tell her mother about it right away, but they eventually made a police report. Brandy, who was 29 years old at the time of trial, expressed sadness that she had no boundaries then.

The investigation and defendant's arrest

Sheriff's Detective Evelio Galvez assisted Sergeant Michael Becker with the investigation. Pursuant to a search warrant, on February 4, 2016, defendant came into the station where Detective Galvez observed and took photographs of defendant's genital area. Defendant's crotch was shaven, with some stubble, and he was uncircumcised. Defendant surrendered his cell phone, and an attempt to extract data such as contact numbers, photographs, and text messages was made. However, the phone contained no memory card and all data appeared to have been removed.

Sergeant Becker, who was assigned to the Special Victims Bureau and was an expert in investigating sexual and physical abuse of children, testified to the reluctance of victims to report crimes against them. He also described their usual reasons for denial. He also testified that on February 3, 2016, a search warrant of defendant's house was executed.

Sergeant Becker supervised the Explorer Program for over three years before going into the child abuse unit. He explained that filing a false police report and accessing criminal history data were criminal offenses, and any Explorer who did so or who made up a story to frame an innocent person would be subject to termination from the program. Sergeant Becker also explained that a Snapchat application automatically deletes messages, unless they are manually saved to a vault. He did not explore other sources of saved communication between Brittany and defendant because Brittany and other witnesses told him that her communication with defendant was through Snapchat, and were thus not recoverable.

Defense Evidence

Testimony of Deputies Bissell and Carter

Deputy Amber Bissell testified that she interviewed Jaley at Quartz Hill High School. Jaley said that her she drank alcohol on one occasion at defendant's house, and that defendant challenged her to drink a large amount of alcohol, but she did not tell Deputy Bissell who gave her the alcohol.

Deputy Stacie Carter testified regarding her April 2014, in-home interview with Brittany. Deputy Carter went there to interview Brittany because she had received a call that a father of another child was supposedly having sexual intercourse with Brittany. The interview lasted about 45 minutes. Brittany appeared to be somewhat comfortable and gave a detailed account of having engaged in sexual activity and intercourse on two occasions with a teenage boy named Devin J. Brittany said that they both consented, and that the boy was her only sexual partner. Deputy Carter claimed that she remained gentle with Brittany throughout the interview, did not pressure her, and that Brittany did not seem emotional.

Deputy Carter thought she was the initial responding officer after the car chase incident, but the incident report indicated that other units had been there about three or four minutes when she arrived shortly before 7:00 p.m. She spoke to Jack and Daniel about the incident.

Dowdell testimony

Brittany Dowdell testified that defendant was her boyfriend. They first met in the spring of 2012, started dating, had a sexual relationship in 2013, stopped in 2014, and got back together off and on in January or February 2015. Dowdell did not live in Quartz Hill, but in Palmdale and later in Rosamond. She knew Isaac, as well as defendant's tenant Eileen and her three children, who ranged in age from eight years to Isaac's age,

13 or 14. Dowdell had also met Isaac's friends Jack, Cameron, Daniel, Ben, and numerous other boys, but she had seen Brittany only twice. Isaac had many friends come to their house. Their activities included using their phones, hanging out, riding dirt bikes, and going out on defendant's off-road vehicle. Defendant had a good relationship with his son and his friends, and he was like a father to all of them.

In 2014, Dowdell reconciled with her son's father, defendant met someone else, and they broke off their relationship. She did not know who defendant's new person was at the time, and later learned that her name was Kari-Lyn Molles. Dowdell never met her. In October 2014, Dowdell had a baby, and the same month, Molles had defendant's baby. Dowdell spoke to Molles on the phone, but they did not have a friendly relationship. Dowdell never lived with defendant, but in 2015, when she attended college nearby, she would drop by after class.

Dowdell never saw defendant drink alcohol or provide alcohol to any children, and never saw alcohol in his home. She never saw defendant act inappropriately with his son or with any children. She never felt any type of concern while there. Isaac was a good-looking, likeable kid, popular at school, with many friends. Dowdell did not know many of Isaac's female friends, and did not think that girls spent the night at the house. Dowdell never met Anna, although she and Isaac were very close, but she met Brittany at Isaac's birthday party. When Dowdell noticed that Brittany and Isaac did not seem to be good friends, Isaac told her that Brittany was upset that he did not want to be with her.

Dowdell did not think that defendant acted like a kid. He was just a good dad who would "goof around" with kids. He had no particular desire to ingratiate himself with the teenagers, so it

would completely surprise her if he had provided alcohol to them. Although Isaac and his friends would box with boxing gloves, they did nothing harmful, and defendant, who did not box, just watched and laughed. Dowdell never saw defendant use a Taser, but she did not think it would be inappropriate to tase a child of 14 or 15, if it was all in fun. She thought the Taser belonged to Jack, and maybe Daniel had one as well.

Isaac and his friends were permitted to come in and out of the house as they pleased, and they did so often. Eileen was also always welcome at any time, and she came in frequently to use the dishwasher or the laundry. The back door was considered the main entrance and it was always unlocked. All doors were always open, although defendant would lock the bedroom door when she was in there with him. Defendant had about a dozen surveillance cameras around the perimeter of the house because he was out of town a lot, had many cars and motorcycles.

Dowdell did not visit on weekends in 2015, but she used the pool about three days per week after class. Although she never lived with defendant she often spent the night in 2015, 2016, and at the time of trial. Dowdell confirmed her phone number, admitted that Molles sent her text messages, but denied that she had ever had a conversation with Molles about allegations that defendant had purchased alcohol for the children. When the prosecutor showed her a screen shot of a text message which displayed Dowdell's phone number at the top and contained a conversation about alcohol, Dowdell denied that she sent the message. The message read: "The booze situation doesn't surprise me. Although he doesn't drink, he really does try to be the cool guy." Dowdell testified, "I never said that." Another text message, which showed Dowdell's name at the top, stated: "I believe he would buy alcohol to be the cool dad." Dowdell denied having sent that message, as well. In redirect examination,

Dowdell testified that she had never seen the messages and did not write them. She usually had her phone with her and had no idea how these messages came to be. She thought they were fabricated.

Dowdell considered herself an alert, smart, strong woman. She loved defendant and thought what was happening to him in this case was outrageous. She had occasion to go through defendant's cell phone, and had never found anything that caused her concern. She and defendant both used Snapchat.

Beaudoin testimony

Eileen Beaudoin testified that she had known defendant for almost eight years, and had rented defendant's guest house since August 2009. Her children, now between 13 and 19 years old, lived there with her. She moved away in July 2016, but she and defendant remained friends. Beaudoin was a stay-at-home mom for most of 2014 and 2015. She home-schooled her children at times, and was on the property nearly "24/7," although she did visit her daughter in Idaho for two weeks during the summer of 2014. Beaudoin would enter defendant's house to do laundry at least several times per week. The back door was almost always unlocked. She was given the run of defendant's house, and did not have to ask permission to enter. Sometimes she would visit and her children would spend time with Isaac. Beaudoin could see and hear Isaac's friends, both boys and girls, but usually more boys than girls, from her back window which faced the pool. She got to know Daniel and his brother David, as well as Cameron and Jack. She did not meet Brittany or other girls.

Defendant worked daily and left town over a few weekends, but he was not away excessively. Beaudoin never saw alcohol in defendant's house and never saw alcohol consumed by anyone on the property. She used the swimming pool, but not when Isaac had his friends over, and she watched her children when they

used the pool. Beaudoin never saw Isaac or his friends engage in any inappropriate activity. She did see them doing yard work, working on cars, and swimming, and her son would play video games with them. They had a bonfire a few times, but she never saw rough-housing, wrestling, or boxing, and she never saw defendant look or act inappropriately with her daughters, who were teenagers in 2014 and 2015. Beaudoin thought she would have noticed if a teenage girl had gone into defendant's house and stayed there for any period of time without the boys. Defendant's entire property except the front of the main house was visible from Beaudoin's house. However, she was usually busy doing laundry, cleaning, grocery shopping, and home schooling her children.

Isaac's testimony

Devin J. (Isaac) testified that defendant was his father, but they had no real relationship until he was 10 years old and began living with defendant part-time. Isaac began living full-time with defendant when he was 13 years old. Isaac met Jack and Cameron in the third grade, they became friends in the seventh grade. He got to know Brittany too, but he was closest to Jack. Isaac considered Daniel to be his best friend, like a brother. Daniel and Jack spent time at Isaac's house almost daily when Isaac was 14 years old. Additional friends visited on the weekends. Cameron and Brittany visited sometimes, but Brittany less so. Isaac estimated that she was there about five times the year that Isaac was 14 years old, and the same number the next year. When they went to the lake, they usually brought others, including Jack, Cameron, Daniel, and sometimes Brittany.

Isaac and Brittany did not have a relationship, but messed around, kissed, and held hands when he was 14 or 15. It was always at her parents' house, never at defendant's. One time she

performed oral sex on him, and another time he touched her private parts. After that, she started acting weird, and became angry because she wanted more of a relationship, while he wanted to go back to being friends. Isaac was busy with school and sports: baseball, football, AP and honor roll classes, as well as international baccalaureate classes. Isaac and his father had a great relationship and spent a lot of time together. Defendant was very supportive and watched all of Isaac's games. Isaac had the structure and support he had never had before, and it was the first time he actually felt loved.

When defendant was away working out of town, Isaac would stay by himself or he would have friends over. Isaac saw Beaudoin and her teenage son and three daughters daily. The back door to his house was always unlocked and they came in whenever they wanted. They all got along pretty well. Though Isaac and his friends consumed alcohol at his house when he was 14 and 15 years old, defendant was never there at those times. Isaac's friends brought alcohol with them, usually vodka or Jack Daniels. Isaac had never seen defendant drink alcohol, and the only alcohol kept in the house was wine for Molles, the mother of Isaac's sister. Isaac drank often, but Isaac did not tell defendant about it because he would not have approved. On occasion, people got drunk, spent the night, but nothing really bad happened. They would clean up and leave nothing behind. Isaac claimed this happened a few times, maybe five times.

Isaac said he and Anna W. had physical contact twice. The first time, he played with her breasts in his father's parked car. The second time, they felt each other's private parts with their clothing on but unbuttoned. They were on the couch at his house, at the same time Kaitlyn F. and defendant were also on the couch, but asleep. After that, they kissed a few times, but not

after Anna started using drugs. Isaac was uncomfortable with that, and stopped communicating with her.

Isaac explained that he hit Daniel at school in January 2016 because Daniel had told people that defendant was sexually "messing around" with Isaac's two-year-old sister. Isaac was called out of class for an investigation of his father, and on the way to the office, he saw Daniel, who said something like "You better keep stepping into the office," so Isaac punched him a few times and then kept going. Their friendship was on the edge by that time. Isaac's tire had been slashed and Isaac thought Daniel did it, because it happened on the day Isaac returned to school after his suspension, and a friend said Daniel had been there before school started, but left soon after.

Isaac explained how he, Daniel and other friends would play with a combination flashlight/Taser device. Defendant, Daniel, and Jack each owned one, and Isaac and his friends played with one of them every day for two months. Isaac would shock himself and the other kids with it, but defendant never did that to him or to others. Although it was a little painful, it was more loud than painful. When Isaac and his friends boxed in the house, they wore gloves and sometimes head gear, and defendant watched them, but he never boxed with him or friends. Isaac and his friends talked a lot about cars, motorcycles, boats and RV's. They would also wrestle, roughhouse, tackle each other, and sometimes throw each other into the pool. Defendant watched them, but did not participate. Isaac testified that once Daniel set a fire in a friend's backyard and was no longer allowed to go there. Isaac was with Daniel when Daniel made his prank 911 call, and they watched the emergency services response at the intersection just outside his home. Isaac claimed that defendant was not present for that.

Isaac testified about the evening at the Antelope Valley Fair when James A. was there with Brittany. Initially, Isaac was with Jack, Cameron, and Brittany. They all walked in together after Jack's parents dropped them off. Toward the end of the evening, Isaac, Jack, and Cameron came across defendant, and then they all came across Brittany while she was still with James. Isaac claimed that when he, Brittany and her brothers left the fair with defendant, James was there, standing not far from them.

In early January 2016, Isaac saw the text message from Daniel to Brittany saying that if she did not contact the police by 3:00 p.m. that day, he would contact them. Isaac asked several friends mentioned in the text, including Daniel, Cameron, and Brittany, to meet in the school parking lot to discuss rumors about Brittany and defendant. Isaac claimed that he knew someone had made a report about his father to the school deputy, but did not know then that it was Daniel, and he could not remember whether the report was made before or after the meeting. Brittany said that nothing had happened. Daniel became angry at Brittany, said that her brothers had told him to help, but he would not if she did not want his help. Later that day, after Isaac told his father about the rumor, defendant called Brittany.

On January 25, 2016, the car chase incident began when Isaac was folding laundry in the living room, where he saw Jack's truck doing a burnout in front of the house. The tires were spinning, and it caused dust, dirt, and loud noises. Although Isaac admitted having issues with Daniel, he denied having a problem with Jack. He was not angry with Jack and still considered him to be a good friend. Isaac claimed that although he had already heard about Brittany and defendant, he did not think it was true. Isaac never saw anything at home or in

defendant's car that caused him to believe anything usual was going on. Brittany had been to the house maybe five times during each of 2014 and 2015, and he never saw anything "weird" between defendant and Brittany.

Isaac knew that Jack had received his driver's license that day or the day before, so he told defendant about Jack's driving, and they discussed how unsafe it was. Isaac and defendant then went to look for Jack, intending to stop him from driving recklessly. Isaac claimed defendant never drove at a high rate of speed, never nearly collided with Jack's truck, and that defendant drove after them for just a few minutes before finding the truck stopped at the intersection. Defendant pulled up "head to head" with the truck, and Isaac saw Daniel, but he did not see another passenger. Jack then maneuvered around defendant's Honda and took off. Defendant followed the truck from behind it about 15-20 feet for no more than five minutes at maybe 30 miles per hour. Isaac claimed that defendant just followed the truck and made no moves to hit the truck. No swerving or any kind of abrupt maneuvers. Isaac was worried that Jack would crash his parents' truck, and he was irritated with Daniel.

When both vehicles stopped at an intersection, Isaac asked his father if he could go sock their window. Defendant said no, so Isaac went and banged on the window of the truck without socking it. Isaac pointed at Daniel and said, "You are fucked." Isaac was angry. He said what he did because Daniel had slashed Isaac's tire and had said something about his family. When Daniel did not reply, defendant drove Isaac straight home without conversation.

Isaac denied that he was trying to scare anyone. He hit the window because he was angry with Daniel for smashing the tire on his truck. Isaac denied that his anger had anything to do with Daniel's report against his father, and he denied even knowing

that Daniel made the report until the day before he testified. Isaac also denied saying "I'm going to fucking kill you," although he admitted that as a result of this incident, he pled no contest in juvenile court to a violation of section 422, subdivision (a), making a criminal threat.

Defendant's testimony

Defendant testified that he bought his house in 2008, when he was in process of obtaining custody of Isaac, who then lived just part-time with him. Defendant obtained full custody when Isaac was 12 or 13. He claimed that the 10 cameras mounted on the house were there for security and no other reason. Defendant liked working on cars; he worked on friends' cars, and sometimes bought and sold cars. Defendant had worked for the same paving company for 14 years, and his work schedule as a heavy equipment operator would vary. Most jobs were out of town, in neighboring counties, and varied from one to four days. Defendant raised Isaac to be trustworthy and allowed him to spend the nights at home on his own. In 2014 and 2015, he would keep in contact with Isaac by phone when he was out of town. During that time Beaudoin and her children lived on the property, and in 2015, defendant's girlfriend, Dowdell was sometimes at the house. Throughout his relationships with Dowdell and Molles, both women were adults.

Defendant kept his back door unlocked, and Beaudoin was allowed to come in whenever she wanted. Her children loved Isaac and they and Isaac's friends could all come and go throughout the house and property whenever and however they pleased. In 2014 and 2015, when he was home, defendant spent most of his time with Isaac. Defendant went to all of Isaac's practices and never missed a football or baseball game unless he was working out of town, although he sometimes arrived late due to work. More than twice a month they went wakeboarding, and

Isaac's friends would go with them when they were able. Jack went maybe five to ten times. Brittany never went with them without her father, and they came along about three to five times. Defendant and Isaac often went places together, such as roller skating or the beach, and defendant permitted Isaac's friends to participate if they first helped Isaac to get his chores done. Defendant thought this was beneficial to them. It taught them responsibility, that everyone needed to work for what they got.

Defendant socialized with Daniel's parents and Brittany's parents. During 2014 and 2015, Brittany came to his house not more than 25 times, but Jack was there almost daily. Cameron came less frequently, but more often as he got older, so he could learn how to use tools. Daniel came over quite a bit and often slept over. When Brittany was there, she would hang out with Isaac's friends or sit in the living room using her cell phone. Defendant claimed that he was not aware of drinking by Isaac's friends while he was out of town, and that he had never witnessed an underage person consume alcohol on his property. Defendant never brought alcohol to his house and did not drink alcohol. Molles brought her own wine to the house, because she was an "adamant" wine drinker.

Defendant claimed that he would "spar" with Isaac, but not with other kids, and not when other kids were there. Isaac and his friends rough-housed a lot. Isaac acquired the Taser/flashlight to take on his ride-alongs, but it was not the kind of Taser that would throw a person down. It would just gave a quick, little, hot and cold shock. Defendant admitted participating about four or five times with Isaac and friends when they were "messing" with the Taser, and he knew there were videos of him using a Taser on the boys. Defendant admitted that he was present when Daniel made the fake 911

call, but claimed he did not know Daniel was going to do it. Defendant saw the emergency responders arrive twice, but did not go out to talk to them, did not tell Daniel's parents afterward, and did not report Daniel to the Sheriff's Department or tell anyone else to do so. Defendant claimed that he was unaware that an anonymous report was made after the report was made about him and Brittany.

Brittany's father Steve H. called defendant after Deputy Carter spoke to Brittany in April 2014. Defendant told him that there had been a report about Brittany and a 34-year-old man, and defendant was 34 at the time. Defendant told Steve that it was not him, and asked whether he wanted to talk about it. Deputy Carter then interviewed Isaac alone, and that ended the matter. Brittany continued to come over at times, but defendant was never alone with her after that.

With regard to the Antelope Valley Fair, defendant testified that Brittany's mother dropped off the kids in the late afternoon and he agreed to pick them up. When defendant arrived, it took about 15 minutes of texting to find Isaac, and then he walked around the fair for about 20 minutes with Isaac, Jack, Cameron, and other people, looking for Brittany. Defendant claimed that he did not know James A., and saw him for the first time when he testified in court. Defendant later testified that when they found Brittany, he saw her with James, just parting from him. Defendant asked her why she had not stayed with her brothers, as her mother had instructed. Defendant then dropped the triplets off at their house, went home with Isaac, and possibly with Jack as well.

Defendant had the cell phone numbers of all Isaac's friends, and he texted all of them. He first heard that Brittany had accused him of having a sexual relationship with her for a year and a half, when she sent defendant a text telling him that

something was going on and that Daniel wanted to turn him in for something. Defendant was concerned, texted and called Brittany's mother, and asked her about Brittany's text. She replied that Sergeant Becker had told her not to talk to him, and she hung up. Defendant also sent text messages to Daniel, possibly on January 12, but he was not certain. Defendant also spoke to Isaac that day, told him what was going on, and Isaac responded that he knew about some message with an unbelievable story, and that he had contacted the people in the message to find out what was going on. Defendant knew it was Daniel who was pressuring Brittany to make a report, but he was not aware that the report was made on January 13, 2016, although he knew that Isaac was going to be taken out of class to be questioned. Defendant claimed he did not find out until after trial started that it was Daniel who made the report. Defendant claimed he could not have been upset with Daniel on January 25, the day of the car incident, even though he knew Daniel had made accusations and was pressuring Brittany, because he did not know that Daniel made the report. Defendant explained that he was not going to be mad at someone who he was not certain made the report. Defendant also knew that Daniel had called him a rapist, but he was not going to take it out on a child who had no clue what he was talking about. Rather than play little games, he went straight to the parents of the alleged victim.

Defendant was contacted by law enforcement a week or two after defendant called Brittany's mother, and sometime during that period, Isaac reported that his truck tire had been slashed. On the day defendant was arrested, Isaac called and said that officers were picking him up from work. After defendant called the Sheriff's station and was told to come in or they would not release his son, defendant surrendered himself. Defendant denied doing anything to his cell phone, and claimed that it was

fully functional when he gave it to Sergeant Becker. When he got the phone back and powered it up, all his contacts and messages were gone. There was no information on it, as though it had been reset.

The accusations resulted in termination of his parental rights to his daughter, although he continued to see her every other weekend. Molles, his daughter's mother, had been communicating with Brittany's family and others who were against him, so Dowdell texted Molles, seemingly as a friend, to find out who she was talking to, but they were not friends.

Defendant denied ever having any sexual contact with Brittany or Anna. He denied having made sexually provocative comments to Kaitlin about her appearance or her body, and he claimed not to remember seeing Jaley intoxicated at his house. He did not remember removing Jaley's clothing and he denied telling her that he had removed her clothing. Defendant denied that Jaley ever spent the night when he was home.

Defendant did not know whether Jack's tire burnout the evening of the car incident was intentional or accidental, but he was concerned that a child from that family was driving recklessly. Defendant knew that Brittany might have made a false accusation of sexual activity against him, but he denied being angry, claiming that he was more concerned. He added that there was no reason to be angry at Jack for something his sister was doing. Defendant's intent when he followed Jack was to talk to him like a parent figure about safe driving.

When defendant found Jack within a few minutes of looking for him, he then saw Daniel, who defendant knew had been involved in "some type of physical incident" with Isaac which caused Isaac some problems at school, in the passenger seat. Defendant also knew Daniel had played some role in Brittany's false accusations. Although he was surprised to see

Daniel, defendant was focused on his worry about Jack. Defendant later admitted that he knew Daniel was in the truck when they passed Daniel's house. Defendant denied traveling at high a rate of speed; he could do no more than 25 to 30 miles per hour because they were on a dirt road. Defendant claimed that he remained 10 to 15 feet behind Jack's truck and never attempted to hit it or force it to go to the right or left. When he stopped parallel to the truck at a stop sign and Isaac got out, defendant told him to get back in the car, but Isaac did not reply. Isaac hit the window, pointed and said, "You are fucked." Defendant could not see Jack and did not try to engage him in conversation. After Isaac returned to the car defendant went straight home in order to avoid any drama with this "stuff."

Defendant was shown Hope's video several times. After initial denials, defendant admitted that the video showed his car following Jack's truck, and also showed him driving on the wrong side of the road. Defendant denied that the video showed him driving unsafely, and he claimed that he drove on the wrong side of the road in order to avoid potholes. Also that the oncoming car shown slowing down in the video did not in fact slow down.

Defendant admitted having engaged in sexual activity with a 14-year-old girl when he was 21, but claimed that it was just once, not twice. He was aware that she was quite young, but did not remember whether she was intoxicated. Defendant was convicted of misdemeanor unlawful sexual intercourse with a minor based on that incident.

Defendant denied ever having been convicted of a felony, though he admitted having been convicted in 2009 of receiving stolen property. Defendant thought it was a misdemeanor, which

was expunged after he finished probation.[3] Defendant explained the case arose from his purchase of a motorized dirt bike from someone who assured him that it had not been stolen despite there being no paperwork. It was not until defendant resold it, that it came up stolen. Defendant denied that two vehicles had been involved, and he denied telling a law enforcement officer that he knew they had been stolen.

Rebuttal evidence

Molles testified that she and defendant had a daughter together. Their two-year relationship begin in early 2013. Molles lived in Pomona, but from December 2013 until May or June of 2014, she spent time weekly at defendant's home. She became pregnant with their daughter in January 2014. Between March 2014 and November 2, 2015, they were friendly, but intimate just twice, although Molles thought they were a couple. Molles suspected defendant was seeing someone else, but did not know throughout most of 2015 that he was seeing Dowdell.

From January through September 2016, beginning when defendant was first in jail, Molles and Dowdell communicated with each other, first on Instagram, then via text message. Dowdell made statements in numerous texts about her belief in defendant's guilt, and they discussed the allegation that defendant had provided alcohol to minors. Molles saved all the text messages in her phone, and at trial, she opened her phone to display them. In addition, screen shots of the texts were admitted into evidence. An April 27, 2016 text sent by Dowdell stated: "He would buy alcohol to be a cool dad." Other messages sent between June and September were also about using liquor to be the cool guy. Molles knew before the communication began

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[3] A certified copy of the minute order showing defendant's conviction of violating section 496 was admitted into evidence but not made a part of the appellate record.

that Dowdell was or had been in a romantic relationship with defendant, but none of their text messages were argumentative. Molles initiated their last communication in February 2017.

Detective David Keesee testified that in 2009, he investigated two stolen vehicles, a KTM dirt bike and an ATV Honda Quad with no V.I.N. number. During the investigation, he interviewed defendant after telling him that he was inquiring about a transaction defendant may have had with Cole Milby regarding the two vehicles. Initially, defendant said he had never had a transaction with Milby regarding the two vehicles, but when Detective Keesee told him he had several sources, defendant apologized for lying and said he did not want to get in trouble with law enforcement. Defendant then confirmed that he knew it was stolen. Defendant said he obtained the Honda Quad from Jay who told him that it had no V.I.N. number because it had been stolen off a dock in Long Beach. Defendant traded a $600 welder for the vehicle, which he believed to be worth $2,500 to $3,000. Defendant also said he obtained the KTM dirt bike from Jay's friend, Randy, after it was found lying in the desert. Defendant thought that was "bull shit," because a dirt bike of that quality would not be found just lying in the desert. Defendant said he traded a Honda Civic for the dirt bike, and then later traded the dirt bike to Milby for a Toyota pickup.

Defendant's surrebuttal

Dowdell testified that she knew that Molles was the mother of defendant's child and that in 2016, defendant was still in contact with Molles because of custody issues over the child. Dowdell was seriously involved with defendant at the time and trying to assist him. The text messages were an effort to obtain information from Molles, and to find out what she would say about defendant. Dowdell knew that Molles had been "buddy buddy" with the "other side of the case" and she did not think it

was fair or right for the mother of defendant's child to do that to him. So Dowdell tried to befriend Molles and made her think they were on the same side, which they were not.

DISCUSSION

I. Evidence of uncharged acts

A. Evidence Code section 1108

Defendant contends that the trial court abused its discretion in admitting evidence of uncharged sexual misconduct pursuant to Evidence Code section 1108 (section 1108), and that the admission of such evidence deprived him of a fair trial and due process in violation of the state and federal constitutions. In particular, defendant contends that the evidence should have been excluded because it consisted of inflammatory propensity evidence which was presented as "character evidence, plain and simple."

Contrary to defendant's suggestion otherwise, propensity evidence is admissible in sex offense cases under section 1108. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286 (*Lewis*).) Indeed, the very purpose of the statute is to relax the evidentiary restraints on propensity evidence imposed by Evidence Code section 1101, subdivision (a), in order "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility. In this regard, section 1108 implicitly abrogates prior decisions of this court indicating that 'propensity' evidence is per se unduly prejudicial to the defense. [Citation.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 910-911, 918-919.)

Section 1108 provides that evidence of a prior sexual offense is admissible in a sex-offense prosecution, subject to "[Evidence Code] section 352, which gives the trial court discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission

will necessitate undue time consumption or create substantial danger of undue prejudice, confusing the issues, or misleading the jury." (*People v. Loy* (2011) 52 Cal.4th 46, 61; § 1108, subd. (a).) To be admissible under section 1108, evidence of sexual misconduct is not limited to evidence of unlawful sexual penetration, but may consist of evidence of any nonconsensual contact between any part of the defendant's body and the genitals or anus of another person, or may simply be evidence of misdemeanor child molestation or annoyance in violation of Penal Code section 647.6. (§ 1108, subd. (d)(1)(A) & (D).) Penal Code section 647.6 prohibits "'offensive or annoying sexually motivated *conduct* which invades a child's privacy and security.'" (*In re D.G.* (2012) 208 Cal.App.4th 1562, 1571.)

"A challenge to admission of prior sexual misconduct under Evidence Code sections 1108 and 352 is reviewed under the deferential abuse of discretion standard and will be reversed 'only if the court's ruling was "arbitrary, whimsical, or capricious as a matter of law. [Citation.]" [Citation.]' [Citation.]" (*People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) It is defendant's burden to demonstrate that the trial court abused its discretion. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) It is not enough to argue that reasonable people could disagree with the trial court. (*Id.* at p. 978.) Nor is it sufficient to present facts which would merely support a different opinion. (*People v. Clair* (1992) 2 Cal.4th 629, 655.) Further, a discretionary decision made under Evidence Code sections 1108 and 352 does not implicate constitutional rights. (*Lewis, supra*, 46 Cal.4th at p. 1289.)

In a pretrial motion in limine, the prosecution sought a ruling on the admissibility of evidence of uncharged misconduct by defendant against Brandy O., Anna W., Kaitlin F., Demree B., Jaley F., and Hope T. Although in his briefs, defendant refers

mostly to the testimony presented at trial, "[w]e review the correctness of the trial court's ruling at the time it was made, . . . and not by reference to evidence produced at a later date. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 739.) We thus review the issue based upon the offers of proof in the motion in limine. The motion alleged that Kaitlin told law enforcement that defendant's home was a "hangout" for teenagers where defendant provided alcohol to minors, and where he "often made flirtatious remarks to teenage girls as if he was trying to come onto them." The motion alleged that defendant was convicted in 2002 of unlawful intercourse with Brandy, committed when he was 22 years old and she was 14 years old. Anna reported that over a period of several weeks when she was 15 years old, defendant groped her leg, "made out" with her three times, and penetrated her vagina with his finger. Demree reported that when she was 14 and Jaley was 15, defendant slapped both of them on the buttocks while they were in bathing suits, that defendant tickled them and grabbed their "love handles" while the girls were in bikinis, and that he once pinned her to the ground, reached into her pants, and grabbed her underwear to give her a "wedgie." Jaley reported that defendant provided her with alcohol, she became intoxicated, blacked out, and woke up the next day without her clothes, bra, and underwear, wearing male underclothing. Defendant told her that she had urinated on herself, so he removed all her clothes and wiped her clean. Finally, the motion alleges: "Daniel O. reported that he witnessed Defendant make several sexually suggestive comments to Hope [T.] while she was still a minor."[4] We conclude that the

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[4] Defendant asserts that only the incidents involving Brandy and Anna were arguably admissible pursuant to section 1108, suggesting that the incident involving the others did not provide evidence of an uncharged sexual offense. We disagree, and note

trial court could reasonably find that the alleged offenses involved sexual penetration or other child molestation.

Defendant argues that the trial court gave insufficient attention to the inflammatory nature of the evidence, the probability of confusing the jury, such that it might conclude that defendant had not been sufficiently punished for the uncharged acts, the remoteness of the incident with Brandy, and the probability of an undue consumption of time. We disagree. The trial court was not required to *expressly* weigh every factor relating to Evidence Code section 352, so long as "'the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352.' [Citation.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 892.) We conclude that it does.

The trial court carefully weighed the probative value against its potential for prejudice in an analysis covering three pages in the reporter's transcript. The potential for prejudice is inherent in all other-crimes evidence, but where the uncharged offenses are not significantly more inflammatory than the charged offense, the risk does not require exclusion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1150.) The trial court expressly found the alleged incidents to be highly probative and not unduly prejudicial, as the conduct alleged in this case was grossly more egregious than in the others, and all but one incident was contemporaneous with the current offense.

The court also expressly found the 2002 case particularly probative and not remote, as defendant had been convicted of unlawful intercourse with a minor, in violation of Penal Code

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that defendant has made no effort to show that the incidents described in the motion in limine involving Kaitlin, Demree, Jaley, and Hope did not amount at the very least to child molestation or annoyance.

section 261.5, and failed to learn from his conviction.[5] There is no bright line rule regarding whether a prior act is too remote to be admissible under Evidence Code section 352. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [12 years prior to trial]; *People v. Branch* (2001) 91 Cal.App.4th 274, 278, 281, 284 [over 30 years between charged and uncharged offenses]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1392-1393, 1395 [18 to 25 years between charged and uncharged offenses]; *People v. Soto* (1998) 64 Cal.App.4th 966, 977-978, 990-992 [20 to 30 years before the trial].) Where, as here, the charged and uncharged offenses share substantial similarities, any prejudice due to remoteness is offset. (*People v. Walker* (2006) 139 Cal.App.4th 782, 807.)

Defendant's reliance on a comparison with *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*) is misplaced. First, the *Harris* court relied on cases construing Evidence Code section 1101, which limits the use of character evidence in ways that section 1108 does not. Second, the facts of *Harris* do not provide a helpful comparison. In that case, the prior offense had occurred 23 years before, not 12 years before, and it was "inflammatory *in the extreme*," as it showed a "violent and perverse attack on a stranger," whereas the charged sexual offenses involved breaches of trust, not force. (*Id.* at p. 738.) Here, as the trial court found, the charged and uncharged offenses were quite similar, involving the inappropriate touching of 14- or 15-year-old girls, some of them intoxicated. Even when alcohol was not involved, and the offense consisted only of inappropriate remarks, it remained that the incidents were highly probative of defendant's propensity to be attracted to young teenage girls and to act on his attraction.

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[5] Defendant asserts that 14 years passed between the time of his offense against Brandy and the current offenses. We count just over 12 years, from late 2001 to early 2014.

We conclude that defendant has failed to demonstrate an abuse of discretion under section 1108.

B. Evidence Code section 1101 (section 1101)

Defendant contends that the trial court erred in relying on section 1101, subdivision (b), to admit the evidence of uncharged misconduct. Subject to the exception provided in section 1108 and other sections, subdivision (a) of section 1101 prohibits admission of uncharged misconduct to prove the conduct of that person on a specified occasion; however subdivision (b) makes clear that this rule does not prohibit admission of such evidence to "prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

The admission of evidence of other offenses under subdivision (b) is a matter of discretion to be exercised under Evidence Code section 352. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668.) With regard to uncharged sexual offenses, we have found no abuse of discretion in the trial court's application of the section 1108 exception to section 1101; thus, that evidence was properly admitted under section 1101, subdivision (b). (See *People v. Callahan* (1999) 74 Cal.App.4th 356, 372.) In addition, we reject defendant's suggestion that such evidence or evidence of other uncharged misconduct was irrelevant or insufficiently probative of exceptions enumerated in section 1101, subdivision (b), such as common scheme, planning, opportunity, or lack of mistake.

A common design or plan "'may be proved circumstantially by evidence that the defendant has performed acts having 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citations.]" (*People v.*

Ewoldt, *supra*, 7 Cal.4th at p. 393.) As the trial court stated here: "Certainly this behavior shows that [defendant] knows how to gain access to young girls and . . . how to perhaps ingratiate himself to young girls. The fact that there is this common approach to young girls, perhaps making them feel comfortable, befriending them and then engaging in sexual behavior with them would go to a common scheme[,] . . . lack of mistake[, and] planning." We agree, and note that providing alcohol and fun activities to minor girls could also imply a common scheme, planning, opportunity, and lack of mistake. "Such evidence, therefore, is not admitted to establish that the defendant has a criminal disposition or bad character, but to prove that he . . . committed the charged offense pursuant to the same design or plan used in committing the uncharged criminal acts." (*Ewoldt*, at p. 399.)

In any event, we agree with respondent that any error in admitting evidence of uncharged offenses is to be evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See *People v. Welch, supra*, 20 Cal.4th 701, 749-750; *People v. Walker*, *supra*, 139 Cal.App.4th at p. 808.) We also agree that under that standard, there was no reasonable probability of a different result if the evidence had been excluded, as Brittany's testimony presented a strong case. She was detailed and precise as to times and places of sexual activity, and her testimony was corroborated in several respects. Brittany testified that she told Kaitlin, Madison, and Alexis about the RV incident, and that testimony was corroborated when Kaitlin testified that Brittany told her about her relationship with defendant during their sophomore year. Brittany testified that she told Daniel of the abuse before she reported it to law enforcement, and that testimony was corroborated when Daniel testified that he knew about it a year or two before and texted

her about it before the report was made. Brittany's description of defendant's anatomy was corroborated by the photograph taken by Detective Galvez, showing his shaved pubic area and uncircumcised penis. Jack testified that Brittany went inside defendant's house almost every time he and others were outside, probably around 100 times, and both Jack and James corroborated Brittany's account of meeting defendant while she was with James before the end of the evening at the fair. Finally, defendant's own behavior in removing the memory card from his phone and assaulting Jack and Daniel with his vehicle just two weeks after Daniel's report to law enforcement, provided evidence of defendant's consciousness of guilt.

In addition, the trial court's instruction to the jury also demonstrates that defendant would not have achieved a different result. The court told the jurors that they could consider the evidence of an uncharged offense only if they found by a preponderance of the evidence that defendant committed the offense, that such evidence was not sufficient by itself to prove beyond a reasonable doubt that defendant committed the charged offenses, and that the People must prove each charge beyond a reasonable doubt. It is presumed that the jurors understood and followed the court's instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670.)

We conclude there was no abuse of discretion, no jury confusion, no constitutional error, and no reversible error in admitting the evidence of uncharged offenses.

II. Alleged instructional errors

Defendant complains of three errors in the jury instructions. First, he contends that CALCRIM Nos. 375 and 1191 were confusing and contradictory when given together. Second, defendant contends that it was likely that a typographical error in CALCRIM No. 3500 resulted in a less than

unanimous verdict. Third, defendant contends that the trial court should have sustained his objection to CALCRIM No. 371, regarding consciousness of guilt. We agree with respondent that defendant forfeited the first two instructional claims by failing to object or to request any modification or amplification of the instructions at trial. (*People v. Lee* (2011) 51 Cal.4th 620, 638.) We also agree with respondent that each claim lacks merit, as we explain below. We thus reject defendant's claim that cumulative instructional errors resulted in a denial of due process.

A. CALCRIM Nos. 375 and 1191

Defendant contends that giving CALCRIM No. 375, which explains section 1101, subdivision (b), in addition to CALCRIM No. 1191, which explains section 1108, could have confused the jury into considering all the evidence of prior misconduct as character evidence.

We discern no conflict, contradiction, or reasonable probability of confusion. CALCRIM No. 1191 expressly explained to the jury that *only* the evidence of the uncharged crimes of unlawful sexual intercourse with a minor and sexual penetration by a foreign object could be considered to infer a disposition to commit sexual offenses and thus that defendant was likely to have committed counts 4 through 10. CALCRIM No. 375 clearly explained to the jury that consideration of the evidence of *other* offenses was limited to deciding the matters enumerated in section 1101, subdivision (b): motive, opportunity, intent, plan or scheme, absence of mistake or accident, and knowledge that the victim was a minor.

Defendant also contends that because CALCRIM No. 375 did not specify which prior offenses the jury was to consider, the jury probably considered his theft-related prior conviction for improper reasons. Not only did defendant fail to request a modification of CALCRIM No. 1191 to specify particular

uncharged offenses, he did not request an instruction such as CALCRIM No. 316, which limits the consideration of such impeachment evidence as a prior conviction to an evaluation of credibility. The trial court was not required to instruct sua sponte regarding the limited admissibility of such evidence. (*People v. Clark* (2011) 52 Cal.4th 856, 934.) Thus, the trial court was not required, on its own motion, either to modify CALCRIM Nos. 375 or 1191 to insert such a limitation or to give a separate limiting instruction.

In reply to respondent's claim of forfeiture, defendant contends that his challenge to the two instructions is not forfeited because he asserted that a conflict between the two instructions resulted in an incorrect statement of law. While we agree that the forfeiture rule does not apply to an instruction that is an incorrect statement of the law (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012), we note that, other than alleging a contradiction between the two instructions, defendant makes no effort to show how the two instructions are incorrect. We do not reach undeveloped claims. (See *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.) Moreover, as we have found no contradiction or possibility of confusing the two instructions, we reject defendant's contention as meritless.

B. CALCRIM No. 3500

Defendant contends that the trial court should have modified CALCRIM No. 3500. The trial court read the instruction as follows:

> "The defendant is charged with oral copulation of a person under 16, in violation of Penal Code section 288a(b)(2) in count [4] sometime during the period of January lst, 2014, to April 21st, 2014. He is also charged with sexual penetration by a foreign object, in violation of Penal Code section 289(i) in count [5] sometime during the period of January lst,

> 2014, to April 21st, 2014. He is also charged with unlawful sexual intercourse, in violation of Penal Code section 261.5(d) in counts 6, 8 and 9 sometime during the period of January lst, 2014, through April 21st, 2014, August lst, 2014, through August 31st, 2014, and December lst, 2014, through January 31st, 2015, respectively. The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed."

Defendant did not object or request a modification of this instruction, but now objects to the use of the singular in referring to "this offense" in the penultimate sentence. He contends that "the safer practice here would have been to give the instruction for each of the offenses it related to" or that the words, "this offense," should have been changed to "these offenses." Defendant contends that a trial court must give an unanimity instruction sua sponte whenever the prosecution has presented evidence of multiple acts to prove a single count; and he concludes from this contention that the trial court had a sua sponte duty to clarify the unanimity instruction given here.

Defendant overstates the rule. Moreover, the trial court was not required to give a unanimity instruction at all. Jury verdicts must be unanimous, and the jury must be so instructed; however "when the evidence suggests more than one discrete crime, *either* the prosecution must elect among the crimes *or* the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, italics added.) The prosecution's election may be made in closing argument, and when the prosecutor does so, "[t]his election

obviate[s] the necessity of a unanimity instruction. [Citation.]" (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292, citing *People v. Russo*, *supra*, at p. 1132.) In closing argument in this case, the prosecutor made the required election separately and thoroughly as to each of the counts mentioned in CALCRIM No. 3500, counts 4, 5, 6, 8, and 9, as well as count 10. As to each count, the prosecutor described the particular act that the jury should find defendant committed, and explained that all jurors would have to agree on that particular act in order to convict defendant of the particular count as to which the election was made.

In addition, neither an election nor a unanimity instruction is required where, as here, defendant's only proffered defense is a denial; in such a case "'the jury's verdict implies that it did not believe the only defense offered.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1199-1200; see also *People v. Meyer* (1988) 197 Cal.App.3d 1307, 1311-1312 [denial of all charged sexual offenses].) Although some courts have found error under similar facts, they have considered the error harmless for the same reason. (See, e.g., *People v. Moore* (1989) 211 Cal.App.3d 1400, 1415-1416; *People v. Schultz* (1987) 192 Cal.App.3d 535, 539-540.)

The last two sentences of the instruction do appear to apply only to the offense of unlawful sexual intercourse, as charged in counts 6, 8 and 9. However, given the prosecutor's thorough explanation of his elections, there is no reasonable probability that the jurors were confused or misapplied the instruction. Moreover, as the instruction was unnecessary and the prosecutor's elections were very clear, we conclude beyond a reasonable doubt that any error in giving the instruction without modification was harmless.

C. CALCRIM No. 371

Defendant contends that the instruction regarding consciousness of guilt allowed the jury to make an irrational permissive inference of guilt in violation of due process.

The trial court read CALCRIM No. 371, as follows:

> "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. If someone other than the defendant tried to conceal or destroy evidence, that conduct may show the defendant was aware of his guilt but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself."

Defendant argues that by instructing the jury that his behavior "may show that he was aware of his guilt," the court equated the behavior with guilt rather than a mere consciousness of guilt. The same language in CALCRIM No. 362 was approved by the California Supreme Court in *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021, 1024-1025, and arguments nearly identical to defendant's were rejected in relation to CALCRIM No. 372 in *People v. Price* (2017) 8 Cal.App.5th 409, 454-458, and *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158-1159. We find the reasoning of those authorities persuasive and equally applicable to CALCRIM No. 371. We thus adopt it here and conclude that the use of the phrase, "may show he was aware of his guilt," and of the everyday word, "aware," rather than its

more formal synonym "conscious" or "consciousness," does not render the instruction constitutionally defective.

III. Alleged discovery violation

Defendant contends that evidence regarding text messages from Dowdell to Molles should have been excluded because it was not disclosed in pretrial discovery.[6]

Although defendant contends that the asserted error resulted in a denial of due process, he does not contend that favorable evidence was suppressed in violation of *Brady v. Maryland* (1963) 373 U.S. 83.[7] Instead, defendant asserts a violation of the reciprocal discovery requirements of Penal Code sections 1054.1 and the time constraints of Penal Code section 1054.7. "Section 1054.1 (the reciprocal-discovery statute) 'independently requires the prosecution to disclose to the defense . . . certain categories of evidence "in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies."' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 279-280.) "Upon a showing both that the defense complied with the informal

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[6] In both his opening brief and reply briefs, the main heading to defendant's argument regarding discovery reads: "Appellant Was Deprived of His Right to Due Process by the Erroneous Admission of Rebuttal Evidence That Should Have Been Excluded Due to the Prosecutor's Discovery Violation in Failing to Disclose as Required by Section 1047.1." The indices refer to section 1047.1 as a Penal Code section. We found no such section, and it is not mentioned in the body of the briefs. We assume from defendant's argument that he meant Penal Code section 1054.1.

[7] *Brady* held that due process requires the prosecution to disclose material *exculpatory* evidence whether or not requested by the defense. (See 373 U.S. at p. 87.)

discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court 'may make any order necessary to enforce the provisions' of the statute, 'including, but not limited to, immediate disclosure, . . . continuance of the matter, or any other lawful order.' (§ 1054.5, subd. (b).)" (*Ibid.*) It was defendant's burden in the trial court to show that he was entitled to discovery of materials which the prosecution had a statutory duty to disclose. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366 (*Kennedy*).)

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard. [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) It is the burden of the complaining party to establish that the trial court abused its discretion and that a miscarriage of justice resulted. (*Kennedy, supra*, 145 Cal.App.4th at p. 366, citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Thus, it is defendant's burden to demonstrate that the trial court's decision was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez), supra*, 14 Cal.4th at p. 977.)

The discovery issue arose after Dowdell was called by the defense and testified on cross-examination that she did not believe that defendant would serve alcohol to teenagers. She denied that she sent the following text messages to Molles: "The booze situation doesn't surprise me. Although he doesn't drink, he really does try to be the cool guy"; and "I believe he would buy alcohol to be the cool dad." Dowdell denied writing or sending the messages. She testified that she had no idea how they came to be, and that she believed they were fabricated. The prosecution called Molles to testify on rebuttal. Molles testified that in numerous text messages, Dowdell had stated that she thought

defendant was guilty. Defense counsel objected to the testimony on the grounds of hearsay, speculation, and inadequate foundation. The trial court overruled the objection as it "[g]oes to impeachment." Without further objection, Molles identified several screen shots of text messages she received from Dowdell. One of the messages stated, "I believe he would buy alcohol to be a cool dad."

After the close of evidence, defense counsel added an objection to the text messages on the grounds of relevance and "late discovery," and asked the trial court to exclude exhibit Nos. 40 through 43. Defense counsel argued that the text messages should not have been admitted in Dowdell's cross-examination or during Molles's testimony. The prosecutor represented that Molles had been included on his pretrial witness list, but he had decided against calling her in his case-in-chief. He decided to use the text messages for impeachment only after hearing Dowdell's denial that she had exchanged the messages with Molles. The prosecutor had received two of the messages two weeks before introducing them (on April 7, 2017), and one of them just two days earlier. Before using the text messages for impeachment the prosecutor turned them over to the defense. The trial court found no discovery violation, and admitted the messages as relevant impeachment evidence.

Defendant contends that the requirement of reciprocal discovery under the federal and state constitutions means that under Penal Code sections 1054 through 1054.7, the prosecution must disclose "all relevant evidence obtained before trial, including rebuttal evidence it intends to use at trial." Defendant does not explain the relevance of the rule of reciprocity here, and he does not describe any circumstance that triggered a reciprocal obligation to disclose evidence. (See generally, *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371-377.) Instead,

defendant's apparent conclusion from his assertion is that the prosecutor was unconditionally obligated to turn over the four text messages. We have found no rule in the authorities cited by defendant which broadly requires the unconditional or automatic disclosure of "all relevant evidence" in the prosecution's possession. (See, e.g., *In re Littlefield* (1993) 5 Cal.4th 122, 135 [section 1054.1 requires disclosure of *specified* information in prosecutor's possession]; *Hill v. Superior Court* (1974) 10 Cal.3d 812, 816-817 [defendant must show good cause to compel disclosure of certain evidence]; *People v. Sanchez* (1998) 62 Cal.App.4th 460, 473-474 [sections 1054 et seq. do not impose duty on prosecutor to discover the existence of evidence].)

Defendant also asserts a discovery violation under the time constraints of section 1054.7, which provides that if any evidence the prosecutor is required to disclose under that section cannot be turned over to the defense prior to trial, it must be turned over immediately upon discovery. The evidence identified by defendant as subject to this rule is the identity of rebuttal witnesses. Defendant devotes several pages of his opening brief to legal principles applicable to the prosecution's obligation to disclose the identity of rebuttal witnesses. However, there was no allegation below that the prosecutor failed to identify any witnesses, including Molles, and the challenge here, as it was below, is to the admission of *text messages*.[8] Any obligation to identify rebuttal witnesses does not impose a duty on the prosecutor to disclose other evidence to be used to impeach a

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[8] Respondent construed defendant's confusing argument as a challenge to calling Molles as a rebuttal witness, and spent considerable time arguing against such a challenge. As defendant has pointed to nothing in the record to indicate that the prosecutor failed to identify rebuttal witnesses, we have no reason to discuss respondent's point.

defense witness. (See *People v. Tillis* (1998) 18 Cal.4th 284, 290-292; *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at p. 377.)

Defendant has failed to show that the trial court's denial of his motion to exclude the text messages was irrational, arbitrary, or contrary to law, nor has he demonstrated a miscarriage of justice due to the alleged untimely disclosure of the text messages or of the prosecutor's intent to call Molles as a rebuttal witness. Instead, defendant simply declares that "[t]he error in this case violated constitutional safeguards of due process and a fair jury trial," and concludes that it must be determined whether the error was harmless beyond a reasonable doubt under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). As defendant did not claim a discovery violation under *Brady*, the applicable harmless error standard is set forth in *Watson*, which requires defendant to show that there was a reasonable probability of a different result absent the alleged error. Defendant's burden to show prejudice must begin with an explanation of what counsel might have done differently if the evidence had been disclosed sooner. (*People v. Verdugo*, *supra*, 50 Cal.4th at pp. 281-282.) As defendant made no attempt to do so or to offer any other prejudice analysis, he has failed to meet his burden.

IV. Exclusion of impeachment evidence

Defendant contends that the trial court erred in limiting his impeachment of Daniel, and that the error deprived him of his rights to due process, a fair trial, and confrontation.

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.]" (*People v. Clark, supra,* 52 Cal.4th 856, 931, fn. omitted.) "[T]rial courts have broad discretion to exclude impeachment evidence other than felony

convictions where such evidence might involve undue time, confusion, or prejudice. [Citations.]" (*People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24.) Evidence Code section 352 "gives trial court broad power to prevent ""nitpicking"" over ""collateral credibility issues."""" Also, as long as the excluded evidence would not have produced a """"significantly different impression"" of the witness's credibility, the confrontation clause and related constitutional guarantees do not limit the trial court's discretion in this regard. [Citation.]" (*Id.* at p. 153.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion. [Citations.]" (*Clark*, *supra*, 52 Cal.4th at p. 932.) Discretion exercised under Evidence Code section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Defendant complains that the trial court "did not allow cross-examination of Daniel regarding violent incidents at school for which he had been suspended, whether he had hacked into a school computer to change his grades, whether he had been suspended three times from the Sheriff's Explorer program, whether he had committed an act of arson, and whether he had used a fake siren on his own vehicle and his explorer badge to pull over girls in a false arrest scenario." Defendant contends that by limiting such impeachment, he was deprived of his rights to due process, a fair trial, and confrontation.

As an initial matter, we reject defendant's suggestion that the trial court erred by striking, on its own motion, Isaac's testimony that Daniel started a fire in a friend's yard, resulting

in him no longer being allowed to go there. Contrary to defendant's characterization of the trial court's ruling, the court did not strike Isaac's testimony regarding the backyard fire. The court's ruling was made *after* that testimony and after defense counsel asked the next question, "Did you and Daniel have any other problems?" Isaac replied, "He would pull people over with his fake -- he would kind of impersonate a cop and talk into and press buttons exactly like a cop siren." As respondent points out, the trial court had found prior to trial that the report of Daniel's misuse of a badge and siren arose from a false complaint made by an acquaintance who was criminally charged for making the false report. After defense counsel stated that he did not intend to introduce it, the court ruled that it would exclude the incident. At trial, the court merely enforced its prior ruling.

Not only was defendant not prevented from eliciting impeachment testimony from Isaac that Daniel started a fire in a friend's yard and was no longer allowed to go there, the trial court also ruled that defendant could impeach Daniel with evidence that he had falsely reported a body in the street in an effort to show his influence with law enforcement. Defendant's remaining conclusory arguments suggest that he takes the position that *unlimited* impeachment should have been allowed simply because Daniel was an important witness, and would face no personal harm from cross-examination on the enumerated alleged incidents. Defendant argues that Daniel was an important witness because he was "inextricably involved" in the proceeding, as he reported defendant's abuse of Brittany and he was a complaining witness regarding the assault charges. However, it is unlikely that defendant would be able demonstrate that unlimited cross-examination would not have involved undue time, confusion, or prejudice. No such showing was made below, and he makes no effort to do so here.

In any event, defendant fails to demonstrate that additional impeachment "would not have produced a ""significantly different impression"" of the witness's credibility." (*People v. Contreras, supra*, 58 Cal.4th at p. 152.) Impeachment with the false report of impersonating a law enforcement officer would have done more to discredit Isaac than Daniel once evidence of its falsity was presented. The backyard fire or so-called arson was unlikely to discredit Daniel, as the trial court found the incident occurred when Daniel and other adolescents caused a fire with fireworks on the Fourth of July. While the others fled, Daniel remained until emergency crews arrived. Although he was disrespectful to Sheriff's deputies, he took responsibility for the fire. He was then temporarily suspended from the Explorer program as a result. Furthermore, defendant has made no effort, either here or below, to show that Daniel's conduct in the fireworks incident amounted to moral turpitude.

Defendant fails to describe the "violent incidents at school," but this apparently refers to defendant's request to ask Daniel whether he had thrown a rock at another student. The trial court asked for an offer of proof regarding the incident, as well as an offer of proof of the incidents regarding the allegations of changing grades and suspensions from the Sheriff's Explorer program. The court found the offers of proof inadequate and vague, but stated that it would revisit the impeachment requests once defendant provided more information. Defendant does not claim here that any further information was provided.

In sum, defendant's briefs omit any discussion of the trial court's findings, and his conclusions fail to demonstrate that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, or those rulings resulted in a miscarriage of justice. He merely offers the bare conclusion that without Daniel, there was no case against defendant. We

disagree. Even if the jury concluded that as a teenager, Daniel showed a propensity to lie, there remained the testimony of Jack and Hope, the two other victims of the automobile assault, and their video. Daniel corroborated Brittany's testimony by testifying that she told him about the abuse prior to it being reported, but even if the jury disbelieved Daniel's testimony, there would remain similar corroboration from the testimony of Brittany's friend Kaitlin, who testified that Brittany told her about the abuse during their sophomore year. Jack and James provided corroborative evidence as well. Since Daniel's testimony was not the only corroborative evidence, it was not as critical as defendant claims. There was no reasonable probability of a different result without Daniel's testimony and the court's rulings were harmless under the test of *Watson*.

V. Joinder of charges

Defendant contends that the trial court erred in ordering the joinder of the car assault charges (counts 1-3) with the sex crimes charges (counts 4-10).

The car assault charges, were originally charged in case No. MA067868, and a preliminary hearing was held in August 2016. The sex offense charges, were filed in case No. MA068234, and the preliminary hearing was held in September 2016. A February 14, 2017 trial date was set for both cases with the assault case to immediately follow the other. At the trial readiness conference, the trial court denied a defense motion for continuance, and found the defense ready to proceed on both cases. On February 14, the prosecution filed a written motion to consolidate the two cases for trial. Finding the two cases to be connected and evidence to be cross-admissible, the trial court granted the motion over defendant's objection.

"Because consolidation ordinarily promotes efficiency, the law prefers it." (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.)

Consolidation obviates the need to select an additional jury, avoids the waste of public funds, conserves judicial resources, and benefits the public due to the reduced delay in the disposition of criminal charges. (*People v. Mason* (1991) 52 Cal.3d 909, 935.) Section 954 permits the joinder of "'two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses,'" under separate counts. "'Offenses "committed at different times and places against different victims are nevertheless 'connected together in their commission' when they are . . . linked by a "'common element of substantial importance.'" [Citations.]'" [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 119.) Evidence of defendant's motivation can provide that connection. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1219.) For example, charged offenses are connected where the defendant's motivation to commit one offense was to intimidate a witness in the other. (*People v. Armstrong* (2016) 1 Cal.5th 432, 455.)

Defendant contends that the sex offenses and the assault offenses did not meet the statutory requirements for consolidation under section 954, because they were not of the same class and were not connected. Whether joinder was proper is evaluated on the showing made to the court at the time of its ruling. (*People v. Marshall* (1997) 15 Cal.4th 1, 27.) The prosecution's motion set forth a summary of the evidence to be presented in both cases, in order to show that the charges were connected by a common element of substantial importance: a motive to retaliate against Daniel for having reported defendant's unlawful sexual relationship with Brittany. It was argued in the pretrial motion that defendant's assault against Daniel and defendant's allowing Isaac to threaten Daniel were motivated by defendant's anger and a desire for revenge against Daniel. To show this connection and the cross-admissibility of the evidence,

the motion set forth a summary of the facts to be presented, including Brittany's testimony, the corroboration of her testimony by Daniel, Jack, and James, the events which soon followed Daniel's report to the police, including Isaac's punching him at school, the vandalism of both Daniel's and Hope's homes, and finally the car chase. We find no abuse of discretion in the trial court's conclusion that the two cases were connected and the evidence would be cross-admissible.

Defendant disagrees. He argues that there would not be two-way cross-admissibility, and that incomplete cross-admissibility cannot justify consolidation. On the contrary, "complete (or so-called two-way) cross-admissibility is not required. In other words, it may be sufficient, for example, if evidence underlying charge 'B' is admissible in the trial of charge 'A' -- even though evidence underlying charge 'A' may not be similarly admissible in the trial of charge 'B.' [Citations.]" (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1221.) We thus reject defendant's argument, and conclude that as the trial court properly found that the two cases were connected and the evidence would be cross-admissible, the statutory requirements for joinder were met. Indeed, the cross-admissibility factor alone justified consolidation. (See *People v. Merriman* (2014) 60 Cal.4th 1, 38.)

Although joinder of charges is favored, a trial court is not required to order consolidation even when appropriate under section 954. (*People v. Merriman*, *supra*, 60 Cal.4th at p. 37.) The trial court may deny consolidation in its discretion where the potential prejudice of joinder outweighs "'the state's strong interest in the efficiency of a joint trial. [Citation.]' [Citation.]" (*Ibid.*) However, where the statutory requirements for joinder are met, the defendant bears the burden of proving error by making a clear showing of potential prejudice. (*People v. Valdez*,

supra, 32 Cal.4th at pp. 119-120.) "[D]efendant must show that a substantial danger of prejudice compelled severance. [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) The following factors may show an abuse of discretion in refusing to sever charges: "'(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]' [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

"Cross-admissibility is the crucial factor affecting prejudice. [Citation.] If evidence of one crime would be admissible in a separate trial of the other crime, prejudice is usually dispelled. [Citation.]" (*People v. Stitely, supra*, 35 Cal.4th at pp. 531-532.) In particular, prejudice is dispelled where one offense provides motive evidence admissible under Evidence Code section 1101, subdivision (b). (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1316.) Thus, the cross-admissibility of such evidence in this case favored consolidation, not severance, and dispelled any prejudice.

Relying on the second and third factors enumerated above, defendant contends that the potential for prejudice was great because evidence of uncharged sexual misconduct was so inflammatory, and that consolidation resulted in joining a relatively weak count (sex offenses) with a relatively strong count (the assaults with a deadly weapon). Not only did defendant fail to raise either of these grounds below, he has not referred to the prosecution's written motion anywhere in this discussion. With regard to factor No. 3, defendant has simply offered a terse

conclusory argument that "[s]ex offenses are inflammatory, particularly when they involve minors, and when joined with other offense [*sic*] has a serious prejudicial effect on the jury." With regard to factor No. 4, defendant argues that the evidence *presented at trial* was weak, as it showed merely "a she said/he said situation." "'[T]he propriety of a ruling on a motion to sever counts is judged by the information available to the court at the time the motion is heard.' [Citation.]" (*People v. Ochoa, supra*, 19 Cal.4th at p. 409.) As defendant has made no effort to show what information was before the trial court when it exercised its discretion, he has failed to meet his burden to establish that potential prejudice compelled separate trials.

If we had found an abuse of discretion, we would apply the test of *Watson*. Under that test, it is the defendant's burden to demonstrate the reasonable probability of a different result. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 746.) Defendant has not met that burden. His entire argument in support of his claim that the evidence of the sex offense was weak, was that it merely presented "a she said/he said situation"; and "There was no forensic evidence, eyewitnesses, or documentation of the alleged relationship. Witness after witness testified that they spent innumerable days and evenings frolicking at [defendant's] house with Brittany and [defendant], and never saw anything to arouse suspicion." Defendant exaggerates when he suggests that no witness ever saw anything to arouse suspicion. James saw defendant's angry discussion with Brittany at the fair when others were not present, after which Brittany said she had to leave with defendant. Jack noticed that although Brittany usually stayed in her room, she came out when defendant was there, was very happy to see him, and then went in her room when he left. Jack also noticed that defendant paid more attention to Brittany than the others, that he texted her a lot,

and that she went into defendant's house almost every time he and others were outside. Finally, Kaitlin testified that after Brittany told her about her relationship with defendant during their sophomore year, it became apparent to her that something not right was going on. She noticed that defendant and Brittany were always very close to each other and very touchy.

Moreover, the secretive nature of sex offenses is the very reason the Legislature enacted Evidence Code section 1108 to permit propensity evidence in such cases. (*People v. Falsetta, supra*, 21 Cal.4th at pp. 911-912; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184.) Overwhelming evidence of defendant's propensity to molest or commit unlawful sexual acts on minor teenage girls included the combined testimony of Brandy, Kaitlin, Jaley, Anna, and Hope. Overwhelming evidence demonstrated that defendant planned his crimes by furnishing alcohol to teenage girls and participating as one of the boys or as a "cool dad" in adolescent activities. Other compelling evidence of planning included his use of Snapchat from which messages disappeared, the installation of a dozen surveillance cameras around the perimeter of the house, keeping a monitor in his bedroom, and Brittany's testimony that defendant preferred having intercourse in a position which allowed him to view the monitor.

As we have noted elsewhere in this opinion, Brittany's testimony presented a strong case. She was detailed and precise as to times and places of sexual activity. Brittany's description of defendant's anatomy was corroborated by the photograph taken by Detective Galvez, showing shaven pubic area and an uncircumcised penis. Defendant concedes that the evidence of the car assault was strong. Indeed, it was overwhelming. The timing of the assault, just two weeks after Daniel's report to law enforcement, provided strong evidence of defendant's

consciousness of guilt. In addition, as we also noted, defendant's own behavior in presenting his phone without a memory card to law enforcement provided strong evidence of defendant's consciousness of guilt.

In sum, the evidence of defendant's guilt of all charges was so overwhelming that if we were to apply the test of *Chapman*, we would conclude that consolidating them was harmless beyond a reasonable doubt.

VI. No cumulative error

Defendant contends that the cumulative effect of all the errors he has asserted was to deny him a fair trial. As we have rejected on the merits all of defendant's claims of error there can be no cumulative prejudicial effect. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316.) Moreover, our harmless error analysis in section V above, would apply equally to any of defendant's asserted errors if they had been well taken. Thus, even considering them together, there is no cumulative effect that might warrant reversal of the judgment. (See *People v. Henriquez* (2017) 4 Cal.5th 1, 48.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT